STATE OF MICHIGAN
IN THE SUPREME COURT

JOSEPH STAMPLIS and THEODORA STAMPLIS,

Plaintiffs-Appellants,

vs.

ST. JOHN HEALTH SYSTEM, d/b/a RIVER DISTRICT HOSPITAL, and G. PHILLIP DOUGLASS, D.O., jointly and severally,

Defendants-Appellees,

and

HENRY FORD HEALTH SYSTEMS, d/b/a HENRY FORD HOSPITAL,

Defendants.

Supreme Court
No. 126980; 127032

Court of Appeals
No. 241801

St. Clair Circuit Court
No. K01-1051-NH

126980

GEOFFREY NELS FIEGER (P30441)
REBECCA S. WALSH (P45331)
VICTOR S. VALENTI (P36347)
FIEGER, FIEGER, KENNEY & JOHNSON
Attys. for Plaintiffs-Appellants
19390 W. Ten Mile Road
Southfield, Michigan 48075-2463
(248)355-5555/Fax (248) 355-5148

JOHN P. JACOBS (P15400)
JOHN P. JACOBS, P.C.
Atty. on Appeal for Dr. Douglass
Suite 600, The Dime Building
719 Griswold
P.O. Box 3360
Detroit, Michigan 48232-5600
(313)965-1900/Fax (313)965-1919

D. BRUCE BEATON (P32704)
Co-Counsel for Plaintiffs
1432 Buhl Building
Marine City, Michigan 48039
(586)765-3333/Fax (586)335-1152

SUSAN HEALY ZITTERMAN (P33392)
RALPH VALITUTTI, JR. (P26128)
KITCH, DRUTCHAS, et al.
Attys for River District Hosp.
One Woodward Avenue, 10th Floor
Detroit, Michigan 48226-3499
(313)965-7900/Fax (313)965-7403

BRUCE R. SHAW (P37994)
WILLMARTH, TANOURY, RAMAR,
CORBET, GARVES & SHAW
Attorney for Henry Ford Hospital
645 Griswold, Suite 2800
Detroit, Michigan 48226
(313)964-6300/Fax (313)965-9386

JANE P. GARRETT (P31689)
BLAKE, KIRCHNER, SYMONDS,
MacFARLANE, LARSON & SMITH, P.C.
Atty. for Dr. Douglass & River
District Hospital
535 Griswold, 1432 Buhl Building
Detroit, Michigan 48226
(313)961-7321/Fax (313)961-5972

PLAINTIFFS' COMBINED RESPONSE IN OPPOSITION TO DEFENDANTS' LEAVE APPLICATIONS

EXHIBITS

PROOF OF SERVICE

Submitted by:
FIEGER, FIEGER, KENNEY & JOHNSON, P.C.
Victor S. Valenti (P36347)
Attorney for Plaintiffs-Appellants
19390 W. Ten Mile Road
Southfield, MI 48075
(248) 355-5555

TABLE OF CONTENTS

PAGE(S)

INDEX OF AUTHORITIES

CASES **PAGE(S)**

STATUTES, COURT RULES AND OTHER AUTHORITIES

STATEMENT OF THE ISSUES

I. DID THE COURT OF APPEALS CORRECTLY REVERSE THE TRIAL COURT'S ORDER GRANTING SUMMARY DISPOSITION TO DEFENDANT RIVER DISTRICT HOSPITAL?

Plaintiffs-Appellees say "Yes"

Defendants-Appellants say "No"

The Court of Appeals said "Yes"

II. DID THE COURT OF APPEALS PROPERLY REMAND TO THE TRIAL COURT FOR ENTRY OF AN ORDER VACATING THE STIPULATION AND ORDER DISMISSING DEFENDANT DR. DOUGLASS WITH PREJUDICE?

Plaintiffs-Appellees say "Yes"

Defendants-Appellants say "No"

The Court of Appeals said "Yes"

III. SHOULD THIS COURT GRANT LEAVE TO CONSIDER WHETHER TO OVERRULE LARKIN V OTSEGO MEMORIAL HOSPITAL?

Plaintiffs-Appellees say "No"

Defendant River District Hospital Says "Yes"

Defendant Dr. Douglass takes no position on this Issue.

The Court of Appeals took no position on this Issue.

COUNTERSTATEMENT OF JUDGMENT APPEALED FROM AND RELIEF SOUGHT

By separate Applications, Defendants River District Hospital (No. 126980) and Dr. G. Phillip Douglass, D.O. (No. 127032) seek to overturn the June 1, 2003 Court of Appeals Opinion (Exhibit 1) that reversed St. Clair Circuit Judge Daniel Kelly's May 3, 2002 dismissal of Defendant River District Hospital and vacated the April 16, 2002 stipulation and order dismissing Dr. Douglas with prejudice. Plaintiffs concede that the Applications are timely and that this Court has discretionary jurisdiction over them under MCR 7.301(A)(2). But, for the reasons set forth in this Response, the Court should decline to exercise interlocutory jurisdiction by denying leave and by allowing this case to proceed to trial at the St. Clair Circuit Court.

Judges Hilda Gage and Kirsten Frank Kelly at the Court of Appeals properly agreed that Plaintiffs were entitled to relief from the judgment of dismissal because the written order entered in the circuit court did not accurately reflect the parties' oral agreement made in open court. Judge Gage specifically recognized that "parties should be able to rely on oral stipulations made on the record in open court," and correctly held that the written stipulation did not reflect what was agreed to by the parties, therefore Plaintiffs were entitled to relief from judgment and vacation of the stipulation and order (Exhibit 1: Gage Opinion, pp 6-8). Court of Appeals Judge Kelly correctly held that the trial

judge abused his discretion by refusing to set aside the stipulation and refusing to grant relief from judgment (Exhibit 1: Kelly Opinion, pp 1-3). Even Judge Murray in his dissent agreed that the majority opinion was "from an equity standpoint, difficult to resist (Exhibit 1: Murray dissent, p 1)."

In short, the Court of Appeals "got it right" and, in doing so, corrected a clear error that perpetrated the substantial injustice of denying Plaintiffs a trial on the merits. The issues Defendants raise in this interlocutory Application satisfy none of the MCR 7.302(B) grounds, and this Court should deny both Applications and permit the case to proceed to trial.

INTRODUCTION

Egged on by defense counsel's conspiracy of silence, the trial court dismissed, on procedural grounds, the claim of Plaintiff Joseph Stamplis who was rendered paraplegic by the medical malpractice of Defendant River District Hospital and its agents. The Court of Appeals majority recognized the serious injustice that the trial court perpetrated upon Plaintiffs by denying them their day in court. The Court of Appeals reversed because Judges Gage and Kelly properly refused to condone Defendants' "sporting theory of justice" that a defendant ought to be given a fair opportunity to beat the case even if it can do so only by surprise or ambush. See Martin v Johnson, 87 Mich App 342, 348 [res judicata inapplicable to bind insured by adverse decision in suit by insurer because it would "encourage a more or less sporting theory of justice"]. The Court further recognized that the trial court was fully aware of Plaintiffs' counsel's intention to proceed against River District Hospital, and should not have allowed Defendants to engage in such chicanery.

The decision by the Court of Appeals corrected a clearly erroneous decision that would have caused material injustice. The decision is sui generis, and does not conflict with any appellate precedents. It does not implicate the validity of a legislative act nor does it involve matters of significant public interest to the state or its agencies or subdivisions. The Court

of Appeals opinion and the issue presented does not rend the fabric of Michigan's jurisprudence.

To the contrary, the only reasonable conclusion here is that whether done as a matter of law or equity, the spirit of justice demanded the Court of Appeals decision to preserve justice by reversal of the summary disposition granted in favor of the Hospital and the remand for entry of an order vacating the stipulation and order dismissing Dr. Douglass and setting the case for trial. This Court should decline to modify that just outcome.

COUNTERSTATEMENT OF MATERIAL FACTS AND PROCEEDINGS

A. Underlying Facts, Plaintiffs' Theory of the Case, and Summary of the Proceedings Before April 16, 2002

This is a complex failure to diagnose/treat medical malpractice case. As a result of Defendants' failure to timely diagnose an epidural abscess in the then 53 year old Plaintiff Joseph Stamplis,[1] he is now a paraplegic who endures excruciating pain on a daily basis.

On January 27, 1997, at 5:30 a.m., Mr. Stamplis presented at the Defendant River District Hospital emergency room complaining of nausea, lightheadedness and intense back pain which had been getting progressively worse since it started the previous day (Hospital Exhibit F: Complaint ¶8).[2] Mr. Stamplis was seen there by Dr. Paul Budnick, a resident physician. Dr. Budnick performed a physical exam and a cursory neurological exam. Dr. Budnick diagnosed muscle spasms in Mr. Stamplis' chest and back, gave him Toradol and Valium and sent him home with a prescription for Toradol and instructions to follow up with a physician in five to ten days (Hospital Exhibit F: Complaint, ¶37).

As the day progressed, despite taking the Toradol, Mr.

---

[1]The claim of Theodora Stamplis, is for loss of consortium (Hospital Exhibit F: Complaint, Count VIII).

[2]Reference to "Hospital Exhibit ____" refers to St. John River District Hospital's Exhibits to its Application for Leave to Appeal.

Stamplis' pain continued to get worse. At about 8:30 p.m., on the same day, Mr. Stamplis returned to the River District Hospital Emergency Room "complaining of pain in his back of 12 on a scale of 1 to 10, and an inability to walk or stand" (Hospital Exhibit F: Complaint, ¶38). Dr. Gerald Fisher, a resident physician, ordered x-rays of Mr. Stamplis' chest, cervical spine and shoulder which were negative, and he discharged him with more pain killers, Demerol, Vicodin and Vistaril and an instruction to use moist heat on his back (Hospital Exhibit F: Complaint, ¶¶39-41).

On January 29, 1997, at about 9:30 a.m., Mr. Stamplis again returned to River District Hospital where he saw Defendant Dr. Phillip Douglass (Hospital Exhibit F: Complaint, ¶¶42-43). He had an elevated temperature, and a burn on his back because he had fallen asleep with the heating pad on, but his major complaint was his continuing severe back pain (Hospital Exhibit F: Complaint, ¶42). Dr. Douglass ignored the back pain complaint and addressed only the burn for which he prescribed Silvadene Cream and discharged Mr. Stamplis (Hospital Exhibit F: Complaint ¶43). He never looked at the records from the prior two emergency room visits.

On January 30, 1997, Mr. Stamplis was seen by his family doctor for the burn on his back and continued back pain (Hospital Exhibit F: Complaint, ¶45). He saw his family doctor again on

January 31, 1997, now complaining of gait disturbance, loss of equilibrium and numbness in his lower extremities (Hospital Exhibit F: Complaint, ¶46). Subsequently, Mr. Stamplis was misdiagnosed with Guillain-Barre Syndrome. Finally, on February 1, 1997, at about 6:00 p.m., an MRI was done at Henry Ford Hospital in Detroit where Mr. Stamplis had been transferred from Port Huron Mercy Hospital (Hospital Exhibit F: Complaint, ¶¶50-54). The MRI showed a thoracic epidural abscess with findings suggestive of cord edema (Hospital Exhibit F: Complaint, ¶55). Mr. Stamplis immediately underwent a T2, T3, T4 and partial T5 laminectomy with evacuation of the epidural abscess (Hospital Exhibit F: Complaint, ¶56). As a result of the delay in diagnosis of a progressive myelopathy, Mr. Stamplis was rendered paraplegic from the thoracic line down (Hospital Exhibit F: Complaint, ¶57). Mr. Stamplis has the worst case of chronic pain syndrome his rehabilitation doctor has ever seen. He has the worst quality of life of any patient his doctor has ever treated.

Plaintiffs filed suit against the three hospitals and several doctors including Budnick, Fisher and Douglass from the River District Hospital Emergency Room (Hospital Exhibit F: Complaint).

Count I of Plaintiffs' Complaint, paragraph 59, alleges that River District Hospital "**undertook and had the duty to provide Plaintiff JOSEPH STAMPLIS with a competent, qualified and**

licensed staff of physicians, surgeons, nurses and other employees, agents, servants and/or independent contractors who would treat Plaintiff's decedent's condition, render competent advice, diagnosis, assistance and treatment to said Plaintiff and that such care and treatment would at all times be in accordance with the standards of acceptable medical practice and/or care in the community" (emphasis added). Paragraph 60 further alleges that River District Hospital "individually and/or through its authorized agents, servants and/or employees breached its respective duties and obligations to Plaintiff JOSEPH STAMPLIS by acting in variance with accepted standards of medical and/or rehabilitative care in this community, and is professionally negligent in the following particulars, which include but are not limited to:

a. Failure to perform or arrange to have performed adequate neurological examination and/or consultation appropriate to the true diagnosis of a progressive myelopathy;

b. Failure to investigate promptly and intensively progressive back pain, thoracic sensory level and leg weakness with neurological signs of spinal cord involvement in order to make an accurate diagnosis leading to proper management;

c. Failure to promptly and timely perform necessary radiological procedures in order to arrive as quickly as possible at an accurate diagnosis of surgically

treatable myelopathy;

d. Failure to immediately and promptly transfer a patient with progressive myelopathy to a facility competent to render care including surgery if necessary;

e. Any other negligent acts and/or omissions which are revealed over the course of discovery."
(Hospital Exhibit F: Complaint, ¶60; emphasis added).

The case, which was filed in Wayne Circuit Court in 1998, was later transferred to St. Clair Circuit Court where it was assigned to Judge Daniel Kelly. On deposition, Plaintiffs' experts testified that the emergency room physicians at River District Hospital did an inadequate neurological examination. Over the course of the three visits, Mr. Stamplis should have, at minimum, been admitted to the hospital for a neurological consultation, or had a neurological consultation in the emergency room. The doctors at River District Hospital failed to make the appropriate diagnosis and failed to order the appropriate diagnostic studies in order to make the proper diagnosis.

With respect to River District Hospital, Plaintiffs' theory is that the Hospital and its physicians failed to timely and properly diagnose and treat the cord compression, spinal epidural abscess. Had any of the River District Hospital Emergency Room physicians done a complete physical examination on the patient, they would have learned that Mr. Stamplis was already

experiencing tingling in his legs and feet and that his back pain was becoming progressively worse. Had any of the three physicians who examined Mr. Stamplis at River District Hospital ordered an MRI, which is the diagnostic tool of choice for any type of cord compression, the spinal epidural abscess would have been diagnosed and treated timely.

B. THE TRIAL COURT PROCEEDINGS

Plaintiffs settled with or dismissed most of the defendants and, on the opening day of trial, the remaining Defendants were River District Hospital, Dr. Douglass and Henry Ford Hospital. Throughout most of the pre-trial proceedings, attorney Jane Garrett alone represented River District Hospital and its emergency room physicians Douglass, Budnick and Fisher. In June 2001, attorney Ralph Valitutti, substituted for attorney Garrett for the Hospital with Garrett continuing to represent Douglass.[3] Nonetheless, at the trial proceedings, the attorneys worked together for the Hospital and Douglass as a "tag team."

On April 16, 2002, before selecting the jury, Judge Kelly met with the parties for a final settlement conference (Hospital Exhibit D: Tr. 4/26/02, pp 4-12). During that fifteen minute meeting, in the presence of all parties and their counsel, including Mr. Valitutti for the Hospital, attorney Garrett,

[3]By this time, Budnick and Fisher had been dismissed.

appearing for Defendant Dr. Douglass, announced an agreement with Plaintiffs' Counsel, Mr. Kenney, for the "dismissal" of Dr. Douglass without payment:

> "[W]e have agreed that Doctor Douglass who has come up from Texas where he now resides for this trial, he will agree to remain here until he takes the stand to testify, which Mr. Kenney has assured me will be sometime before the close of business on Friday; that Plaintiff will then be dismissed with prejudice, the individual claims against Doctor Douglass as a Defendant. And that is why I will not be offering anything on his behalf." (Hospital Exhibit D: Tr. 4/16/02, p 9).

Mr. Kenney explained his understanding of the agreement as follows:

> "MR. KENNEY: **I intend to dismiss Doctor Douglass as a Defendant and proceed against what I presumed to be his principal, the hospital.**
>
> ***
>
> And the other terms he will remain until the close of business Friday so that I can put him on the stand, that's part of the agreement, as well." (Exh D: Tr. 4/16/02, pp 8-10; emphasis added).

Agreeing that the dismissal would be "with prejudice," Mr. Kenney specifically qualified the agreement, adding:

> **[B]ut what I don't want to face, Judge, obviously is that I have dismissed the claims against the hospital for the actions of Doctor Douglass. I'm not doing that. He was the actor."** (Hospital Exhibit D: Tr. 4/16/02, p 10; emphasis added).

At this point, the Court, eager to move settlement

discussions along, said:

> "THE COURT: **I understand. I understand that. I am sure they do, too. Next.** (Hospital Exhibit D: Tr. 4/16/02, p 10; emphasis added).

Ms. Garrett said nothing further. Mr. Valitutti was silent about the agreement, but offered $300,000 on behalf of the Hospital (Hospital Exhibit D: Tr. 4/16/02, pp 10-11). After Henry Ford Hospital also made a settlement offer, the Court adjourned the proceedings to give the parties the opportunity to talk with their lawyers (Hospital Exhibit D: Tr. 4/16/02, pp 12-13).

When the parties reconvened at 1:25 p.m., Ms. Garrett was still present. Plaintiffs elected to proceed to trial against the two Hospitals [River District and Henry Ford] (Hospital Exhibit D: Tr. 4/16/02, pp 13-14). Ms. Garrett then announced that, "over the noon hour **we prepared a stipulation and order of dismissal"** which had been executed by all counsel and signed by the Court (Hospital Exhibit D: Tr. 4/16/01, pp 14-15; emphasis added). Colloquy about jury selection and challenges then followed (Hospital Exhibit D: Tr. 4/16/02, pp 15-19).

The first hint to what Defendants' "tag team" was doing came when Mr. Valitutti proposed "to address the Court with motions before *voir dire*" (Hospital Exhibit D: Tr. 4/16/02, p 19). When the obviously puzzled Court asked what motions Mr. Valitutti had in mind, he responded that he had a motion for summary judgment

for River District Hospital (Hospital Exhibit D: Tr. 4/16/02, p 20). The Court stated that jury *voir dire* would proceed (Hospital Exhibit D: Tr. 4/16/02, p 20).

When Mr. Kenney asked if Dr. Douglass and Ms. Garrett were leaving, Ms. Garrett suddenly announced that she was staying as co-counsel for the Hospital ("**I guess I'll make an oral appearance for River District Hospital then**")(Hospital Exhibit D: Tr. 4/16/02, p 20; emphasis added). Then, Mr. Valitutti chimed in with the following:

> "MR. VALITUTTI: **Is there any objection to Doctor Douglass being present? We're entitled to designated defendant.** (Hospital Exhibit D: Tr. 4/16/02, p 21; emphasis added).

Thus, the Hospital chose to have Ms. Garrett continue to participate as co-counsel and to make Dr. Douglass its designated agent/representative for jury *voir dire* despite the just-entered dismissal and despite the fact that the Hospital already had two employees, Connie Hoyin and Frank Palmer, present and available to be its designated representatives (Hospital Exhibit D: Tr. 4/16/02, pp 14, 21).

The Hospital submitted a five page written motion and brief for summary disposition that looked as if it was prepared over lunch on the same word processing equipment as the Stipulation for Dismissal of Dr. Douglass and, in anticipation of its entry. This motion and brief was obviously drafted by the same person

who drafted the Stipulation and Order Of Dismissal --- as both contain the same inaccurate caption which was **never** the case caption during Mr. Valitutti's participation with this case.

When the Court reconvened the next morning, the Hospital argued its summary disposition motion (Hospital Exhibit E: Tr. 4/17/02, p 8). The Hospital asserted that the voluntary stipulation of dismissal of Dr. Douglass was *res judicata* and that with his dismissal, the vicarious liability claim against the Hospital was also dismissed (Hospital Exhibit E: Tr. 4/17/02, pp 8-10).

Plaintiff was not given time to prepare a written response to the summary disposition motion. Mr. Kenney orally responded that, as in Larkin v Otsego Memorial Hospital, 207 Mich App 391 (1994) lv den 450 Mich 866 (1995), there was always the intent to proceed against the Hospital (Hospital Exhibit E: Tr. 4/17/02, p 16). He asserted that, under the principles set forth in Larkin, the agreement to dismiss Douglass is a covenant not to sue (Hospital Exhibit E: Tr. 4/17/02, p 29).

Later Mr. Kenney reiterated that:

> **"It's clear what I wanted to do is enter into a covenant not to sue. That was clear.**
>
> I did understand. All we're talking about is whether the language - what the language of the order is. What the clear intent was to enter into a dismissal of Doctor Douglass such that I would still be allowed to proceed against the hospital." (Hospital Exhibit E: Tr. 4/17/02, pp 26-27;

emphasis added).

Judge Kelly then suggested that Plaintiffs' counsel had made a mistake of law from which there was no relief because the agreement did not include the Hospital (Hospital Exhibit E: Tr. 4/17/02, pp 29-30). Mr. Kenney responded that there was no mistake of law because the agreement was squarely within the law set forth in Larkin (Hospital Exhibit E: Tr. 4/17/02, pp 31-32). Judge Kelly then stated:

> "I understood what your intent was. I don't know that there was on the record an affirmation or agreement by the parties that would be bound by that interpretation. That's kind of what I was hoping we would find somewhere on that transcript, the hospital to say, yes, we understand that and we expect that he will be entitled to proceed against us. That's absent." (Hospital Exhibit E: Tr. 4/17/02, p 32).

Mr. Kenney then pointed out that there was no reason for him to pursue an express affirmation by Mr. Valitutti because the Court indicated that it was not necessary by saying, "**I think they understand, I understand it, and I think everybody understands it**." (Hospital Exhibit E: Tr. 4/17/02, pp 32-34).

Mr. Kenney added that it was absolutely clear, based not only on his statements preceding the signing and entry of the dismissal, but also based on the statements in open court, that "at no time did we intend to have a dismissal of Doctor Douglass act as *res judicata* or a dismissal of the principal" (Hospital Exhibit E: Tr. 4/17/02, pp 10-13). Plaintiffs alternatively

requested that the Court "on just terms" grant relief, calling "what happened here. . . **sandbagging of the . . . lowest order**" (Hospital Exhibit E: Tr. 4/17/02, p 13; emphasis added). Citing to the MCR 2.612(C)(1)(a), provision for "mistake, inadvertence, surprise, or excusable neglect," he argued that the dismissal failed for lack of intent or meeting of the minds (Hospital Exhibit E: Tr. 4/17/02, p 13). Plaintiffs also asked the trial court to amend the Order to reflect a dismissal of Dr. Douglass without prejudice (Hospital Exhibit E: Tr. 4/17/02, p 16).

Judge Kelly adjourned the hearing to review the cases and arguments. (Hospital Exhibit E: Tr. 4/17/02, p 34). When he reconvened court an hour later, Mr. Kenney asked the judge to be given time to file a written brief, which the judge denied (Hospital Exhibit E: Tr. 4/17/02, pp 34-35). Judge Kelly then ruled that further proceedings are barred by operation of law:

> "The decision to dismiss Doctor Douglass with prejudice is res judicata as to any claim for vicarious liability against River District Hospital. The law is well settled on that point. Further, there is no credible evidence that the dismissal was understood by the Doctor to be merely a covenant not to sue. **At the same time, the record is also very clear that counsel for Plaintiff never intended to waive his right to pursue his vicarious liability claims against River District Hospital. Unfortunately for Plaintiffs, it has had that legal effect.**
>
> Plaintiff's counsel repeatedly acknowledged that the dismissal was to be with prejudice. Nowhere did River District Hospital agree to waive its legal defense of

> res judicata. Additionally while subsection (c)(1)(f) offers broad leeway when extraordinary circumstances demand vacating orders to achieve justice, it has never been interpreted to be designed to relief counsel of ill-advised or careless decisions. Also, it is normally a provision that is only invoked and available where other remedies under that court rule are not provided.
>
> It's my preference that the case proceed and to be decided on the merits, but I believe that the operation of law precludes that. The motion must be granted." (Hospital Exhibit E: Tr. 4/17/02, pp 35-36).

Before trial could proceed against the sole remaining Defendant, Henry Ford Hospital, the parties orally agreed to settle (Hospital Exhibit E: Tr. 4/17/02, p 43). The jury was dismissed (Hospital Exhibit E: Tr. 4/17/02, p 43). A non-final order dismissing River District Hospital was entered on May 3, 2002 (Hospital Exhibit B: Order).

Since the dismissal of Henry Ford Hospital had not yet been entered and the orders regarding Douglass and River District Hospital were not "final," Plaintiffs moved timely under MCR 2.604(A) and asked the trial court to revise the interim orders before entry of final judgment. Plaintiffs' motion for relief with respect to both the Douglass Order and the River District Hospital Order was brought under the provisions of MCR 2.612(C)(1) and (3). At the May 13, 2002 hearing, Plaintiff asserted that Defendants' conduct on April 16, 2002 in appointing Ms. Garrett as co-counsel and Dr. Douglass as the Hospital's

corporate representative at the trial, coupled with the applicable caselaw, established that the trial court "was misled in terms of the effect and the nature of what was going on here" (Hospital Exhibit G: Tr. 5/13/02, pp 6-7). On May 16, 2002, Judge Kelly denied the motion (Hospital Exhibit 3: Order). Following the May 28, 2002 entry of the order dismissing Henry Ford Hospital (Hospital Exhibit 4), the orders regarding Douglass and River District Hospital became final, and Plaintiffs filed their timely Claim of Appeal.

C. The Court of Appeals Ruling

On June 1, 2003, the Court of Appeals reversed in an unpublished opinion. Judge Hilda Gage, with Judge Kirsten Frank Kelly concurring, granted relief from judgment under MCR 2.612.

In her lead opinion, Judge Gage recognized that the mistake or misconception by Plaintiffs' counsel "was wholly contributed to and encouraged by defendants' counsel" (Exhibit 1: Gage Opinion p 7). Judge Gage found that both defense counsel had a duty of disclosure "in light of the remarks made by plaintiffs' counsel and the trial court," and that both defense counsel knew that Plaintiffs' intentions were to proceed to trial against the Hospital. Thus, Judge Gage's lead opinion rejected the Hospital's assertion that Plaintiffs' counsel's actions were wholly unilateral. Judge Gage concluded that "parties should be able to rely on oral stipulations made on the record in open

court" and held that the written stipulation did not reflect what was agreed to by the parties. Saying that justice would not be done unless the stipulation was set aside, Judge Gage explained, "[t]o deny plaintiffs a trial under this scenario would be an unjustice" because "at the end of the day, those rules, as well as the spirit of the law must be applied in such a manner as to keep justice alive." (Exhibit 1: Gage Opinion p 8).

In her concurrence, Judge Kelly found that the trial judge abused his discretion by refusing to set aside the stipulation and refusing to grant relief from judgment. Judge Kelly said the statements made in open court "were overt and unambiguous statements of plaintiffs' counsel's intent and the substance of the parties' agreement," and "not, as the dissent opines, plaintiffs' counsel's '*unilateral* understanding of the intent of the order'" (Exhibit 1: Kelly concurring opinion, p 2). Judge Kelly said that, standing alone, "the trial court's denial of plaintiffs' motion despite the previous day's discourse on the record was an abuse of discretion." (Exhibit 1: Kelly concurring opinion, p 3). Judge Christopher Murray dissented.

Both Defendants filed timely motions for rehearing which were denied. Defendants then filed separate leave applications.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY FOUND THAT SUMMARY DISPOSITION SHOULD NOT HAVE BEEN GRANTED TO THE HOSPITAL BECAUSE THE TRIAL COURT ERRED AT LAW IN FAILING TO EFFECTUATE THE UNDISPUTED INTENT OF PLAINTIFFS' COUNSEL THAT WAS EXPRESSED BY THE TRIAL COURT WITHOUT DISAGREEMENT BY DEFENDANTS; MOREOVER, THE TRIAL COURT ABUSED ITS DISCRETION BY ENTERING, AND THEN REFUSING TO VACATE, THE JUDGMENT BASED ON MCR 2.612.

A. Counterstatement Of Standard Of Review

The trial court granted summary disposition to River District Hospital saying that the claim against the Hospital was barred because of release of Dr. Douglass under MCR 2.116(C)(7). Appellate courts review de novo the trial court's ruling on summary disposition asserting that a claim is barred and that the moving party is entitled to judgment as a matter of law. Stoudemire v Stoudemire, 248 Mich App 325, 332 (2001). The trial court's subsequent refusal to grant relief from judgment is ordinarily reviewed for an abuse of discretion, Driver v Hanley (After Remand), 226 Mich App 558, 564-565 (1997).

At the Court of Appeals, Judge Gage reversed based on an erroneous grant of summary disposition, while Judge Kelly found that the trial judge abused his discretion when he denied Plaintiffs' motion for relief from the judgment of summary disposition. Plaintiffs submit that where, as here, the decision to grant the summary judgment in the first instance is found to

be erroneous, appellate review should be performed de novo, and not using the far more deferential abuse of discretion standard. Nonetheless, under either standard of review, the decision of the Court of Appeals is correct.

B. The Improper Grant Of Summary Disposition Was Properly Set Aside Pursuant To MCR 2.612.

Judges Gage and Kelly at the Court of Appeals independently focused on subsections of MCR 2.612(A)and (C) to relieve Plaintiffs from the erroneous order granting summary disposition. Those subsections provide in relevant part:

> **RULE 2.612 RELIEF FROM JUDGMENT OR ORDER**
>
> **(A) Clerical Mistakes.**
>
> (1) Clerical mistakes in judgments, orders, or other parts of the record and errors arising form oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party and after notice, if the court orders it.
>
> * * *
>
> **(C) Grounds for Relief From Judgment.**
>
> (1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect.
>
> * * *
>
> (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
>
> * * *
>
> (f) Any other reason justifying relief from the operation of the judgment.
>
> * * *
>
> (3) This subrule does not limit the power of a court

... to set aside a judgment for fraud on the court."

MCR 2.612 provides a series of grounds for relief from judgment where compelling circumstances require such relief in order to avoid serious injustice. The majority at the Court of Appeals recognized that the trial court had to be reversed here to avoid serious injustice with Judge Gage finding elements of mistake, fraud, or unconscionable advantage and Judge Kelly reaching the same conclusion by finding a clerical error because the trial court's order failed to accurately reflect what occurred on the record. The majority's opinion, whether characterized as a reversal of summary disposition or as relief from judgment, was correct and does not warrant plenary Supreme Court review.

C. The Decision By The Court Of Appeals Is Well Supported On The Basis Of Mistake, Fraud And Grounds Of Equity.

While unwilling to declare defense counsel's conduct a conspiracy, Judge Gage found it would be unjust to deny Plaintiffs a trial under the scenario presented. The ruling is correct. The individual elements leading Judge Gage to this conclusion are summarized here.

1. The Court Correctly Granted Relief Based On Mistake.

Relief from a judgment or order is clearly called for if the mistake or neglect is by the moving party, opposing parties,

those of counsel, or in what is actually done or decided by the Court. Dean & Longhofer, Michigan Court Rules Practice, Text §2612.10, pp 474-475. To be sure, the mistake must not be due to the party or his attorney's own carelessness, ignorance of the rules or a faulty procedural decision in the case. But, that is not what happened here. In this case, Plaintiffs were deceived by Defendants into an agreement which the trial court mistakenly construed as barring the continuation of the case against the Hospital.

The trial court, in its April 17, 2002 ruling, focused on what it characterized as Plaintiffs' mistake of law. The court then cited the general rule that a mistake of law, rather than mistake of fact, is not subject to correction by the court. The trial court ignored the exceptions.

Judge Gage found that this case presented the kind of mistake of law that courts are bound to correct. It is settled law that where a mistake of one party at the time the contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake, and (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or (b) the other party had reason to know of the mistake or his fault caused the mistake. In Carpenter v Detroit Forging Co, 191

Mich 45, 53-54 (1916), our Supreme Court stated that:

> "Whether placed upon the ground of constructive fraud or mistake of fact as well as of law, **the law forbids that a party who, with full knowledge of the ignorance of the other contracting party, has not only encouraged that ignorance, but has knowingly deceived and led that other into a mistaken conception of his legal rights, should shield himself behind the doctrine that a mere mistake of law affords no grounds for relief."** (emphasis added).

Similarly, in Renard v Clink, 91 Mich 1, 3-4 (1892), the Court said:

> "While it is a general rule that equity will not relieve against a mistake of law, this rule is not universal.
>
> * * *
>
> "[W]here a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, or estates, and enters into some transaction, the legal scope and operation of which he correctly apprehends and understands for the purpose of affecting such assumed rights, interests, or estates, **equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact."** (emphasis added).

More recently, in Komraus Plumbing v Cadillac Sands Motel, Inc., 387 Mich 285, 290 (1972), the Supreme Court cited Renard with approval, adding that the general rule does not apply where the neglect is due to some "stratagem, trick, or artifice on the part of the one seeking to enforce the contract." Accord: Stone v Stone, 319 Mich 194, 198-199 (1947), also citing other cases.

The rule set forth in Carpenter and Renard is embodied in the Restatement 2d, Contracts §153:

> "When Mistake of One Party Makes a Contract Voidable Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154,[4] and
>
> (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or
>
> (b) the other party had reason to know of the mistake or his fault caused the mistake."

As the comments and illustrations to the rule explain, relief will be granted **where the other party actually knew or had reason to know of the mistake at the time the contract was made.** Comment "a" states that, "[t]he parol evidence rule does not preclude the use of prior or contemporaneous agreements or negotiations to establish that a party was mistaken. See: Fisher v Stolaruk Corp, 110 FRD 74, 76 (ED Mich 1986) [equity will provide affirmative relief by way of recission where one party made a mistake as to the meaning of a contract and the mistake was known to the other party]; CN Monroe Mfg Co v United States, 143 F Supp 449 (ED Mich 1956) [allowing restitution where plaintiff mistakenly underpriced his bid because defendant should

---

[4]The situations set forth in §154 do not apply to this case.

have known of gross mistake].

Here, as Plaintiffs' counsel asserted on April 17, 2002, there was no "meeting of the minds" if the agreement is interpreted as Defendants assert to include dismissal of the Hospital. Under the circumstances presented, it is absolutely clear that both the attorney for Dr. Douglass and the attorney for the Hospital "had reason to know" of the "mistake." Counsel for Dr. Douglass who drafted the stipulation (obviously on the same word processor as the Hospital's summary disposition motion) must have the agreement construed against her client. The surrounding statements and circumstance which are admissible[5] clearly show that Plaintiffs would not have entered into an agreement the direct effect of which was dismissal of the Hospital.

The lead opinion at the Court of Appeals recognized this, Mate v Wolverine Mut Ins, 233 Mich App 14 (2000), citing for the proposition that in the context of reformation, the law is established that an instrument can be reformed to reflect the parties' actual intent if there is clear evidence that both parties reached an agreement but that, as a result of mutual mistake or mistake on the part of one and fraud on the part of

---

[5]Rood v General Dynamics, Inc., 444 Mich 107, 119 (1993):

> "Look to expressed words of the parties and their visible acts".

the other the instrument does not express the true intent of the parties." (Exhibit 1: Gage Opinion, p 6)

This case is not analogous to Limbach v Oakland County Rd Commissioners, 226 Mich App 389 (1997) lv den 459 Mich 988 (1999) as Defendants assert. First, Limbach concerned two contemporaneous lawsuits **involving the same plaintiff and same defendant.** Second, the mistake in this case is factually like the mistake in Great American Ins. Co v Old Republic Ins Co, 180 Mich App 508, 510-511 (1989), which the Limbach Court allowed was the "type of mistake [which] might be sufficient to allow a trial court to grant relief from judgment."[6] Limbach, at 393. Judge Gage explicitly recognized this exception (Exhibit 1: Gage Opinion, p 6).

As the majority at the Court of Appeals recognized, the extrordinary circumstances and the substantial injustice of enforcing the agreement as also allowing dismissal of the

---

[6] In Great American, the Court of Appeals approved of the trial court setting aside the mediation award **and quoted the trial court's statement that, based on counsel's desire for "a decision on the merits" it was "obvious to me at the time, I think everybody, that there was no acceptance of the mediation award." This is virtually identical to this Court's statement at the time of the stipulation that "I am sure they [i.e., Defendants River District Hospital and Douglass] do [understand] too"** (Hospital Exhibit E: Tr. 4/16/02, p 10). Again, in the Court's April 17, 2002 ruling is its specific acknowledgment that, **"the record is very clear that counsel for Plaintiff never intended to waive his vicarious liability claims against River District Hospital."** (Hospital Exhibit E: Tr. 4/17/02, p 35; emphasis added).

Hospital compelled the vacation of the Order based on mistake.

2. The Court Correctly Granted Relief Based On Fraud, Misrepresentation Or Misconduct By Defendants That Was Tantamount To A Conspiracy.

MCR 2.612(C)(1)(c) provides for relief from judgment for fraud. A fraud is perpetrated on the court when some material fact is concealed from the court or when some material misrepresentation is made to the court. Valentino v Oakland County Sheriff, 134 Mich App 197, 207 (1984) affd in part 424 Mich 310 (1986); DeHaan v DeHaan, 348 Mich 199 (1957). Fraud may be consummated by **suppression of a material fact which results in a false impression.** U.S. Fidelity & Guaranty Co v Black, 412 Mich 99, 115 (1981). The fact suppressed must be one which the party is in good faith bound to disclose. Groening v Opsata, 323 Mich 73, 83 (1948). Where the particular circumstances impose a duty to speak, but the person deliberately remains silent, the silence is equivalent to a false representation. As this Court's recent decision in Hord v Environmental Research Inst, 463 Mich 399, 412-413 (2000) makes clear, "a legal duty to make a disclosure will arise most commonly in a situation where inquiries are made by the plaintiff, to which the defendant makes incomplete replies that are truthful in themselves but omit material information." Citing Groening, supra [buyer's inquiry regarding erosion of bluff on which house was situated] and Sullivan v Ulrich, 326 Mich 218, 227-230 (1949) [buyer's inquiry

regarding termites].

Here, Mr. Kenney stated on the record exactly the intent of Plaintiffs' agreement: that Plaintiffs were dismissing Dr. Douglass but not the claims against the Hospital. But, before he could ask the Hospital to confirm this agreement, the trial court, attempting to move matters along, interjected, **"I understand that, I am sure they do, too. Next."** (Exh. D: Tr. 4/16/02, p 10; emphasis added). At this point, if the Hospital (or Dr. Douglass) disagreed with the trial court's statement of understanding regarding the scope and effect of the agreement, it was incumbent upon counsel for either or both of them to speak. Their silence in the face of the trial court's statement was sandbagging of the worst kind. It amounted to the perpetration of a fraud on the court. Since the trial court stated the understanding of the parties – the Defendants were required to advise the trial court of its error – not use the Court's misunderstanding against the Plaintiffs immediately thereafter to obtain the dismissal of the Hospital.

The Court of Appeals did not specifically discuss it, but the trial court decision ignored extrinsic fraud. "Extrinsic fraud" is fraud which actually prevents the losing party from having an adversary trial on a significant issue. Stallworth v Hazel, 167 Mich App 345, 355 (1988); Rogoski v City of Muskegon, 107 Mich App 730, 736 (1981). Theophelis v Lansing General

Hospital, 430 Mich 473, 493 (1988), recognizes that a clear and convincing showing of fraud that induced a unilateral mistake is grounds for rescission of an agreement. See also: Windham v Norris, 370 Mich 188, 193 (1963); Groesbeck v Bennett, 109 Mich 65 (1896).

Moreover, is a bedrock tenet of our profession that lawyers owe a duty of candor and fairness in their dealings with judges and opposing counsel. That duty was breached here when Defendants stood silently before the trial court while Mr. Kenney described the scope of Plaintiffs' dismissal of Dr. Douglass as definitely not including dismissal of the Hospital. When attorneys breach their professional responsibility of candor and fairness, courts have not hesitated to intervene.

Thus, in Virzi v Grand Trunk Warehouse, 571 F. Supp 507 (E.D. Mich 1983), Judge Horace Gilmore vacated a settlement in a personal injury case where plaintiff's counsel failed to advise defense counsel or the court that plaintiff, who was expected to be a good witness, had died from causes unrelated to the lawsuit in the period between the mediation award and the placing of the settlement on the record. The judge vacated the settlement even though defense counsel never asked plaintiff's attorney if plaintiff was still alive and available for trial. The court rejected the argument that plaintiff's counsel had no duty to volunteer the information. Judge Gilmore cited Rule 3.3(a)(2) of

the Model Rules of Professional Conduct which has subsequently been adopted verbatim as MRPC 3.3(a)(2):

> "A lawyer shall not knowingly fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client."

Quoting Judge Rubin's law review article "A Causerie on Lawyer's Ethics in Negotiations," 35 LaLRev 577 (1975), Judge Gilmore observed,

> "'Another lawyer. . . who deals with a lawyer should not need to exercise the same degree of caution that he would if trading for reputedly antique copper jugs in an oriental bazaar.
>
> * * *
>
> The distinction between honesty and good faith need not be finely drawn here; all lawyers know that good faith requires conduct beyond simple honesty.'"

As Judge Gilmore further explained:

> "There is no question that plaintiff's attorney owed a duty of candor to this Court, and such duty required a disclosure of the fact of the death of the client. Although it presents a more difficult judgment call, this Court is of the opinion that the same duty of candor and fairness required a disclosure to opposing counsel. . .
>
> * * *
>
> Opposing counsel does not have to deal with his adversary as he would deal in the marketplace. Standards of ethics require greater honesty, greater candor, and greater disclosure. . .
>
> The handling of a lawsuit and its progress is not a game. There is an absolute duty of candor and fairness on the part of counsel to both the Court and opposing counsel." 571 F.Supp at 512.

See also: Spaulding v Zimmerman, 116 NW2d 704, 709 (Minn 1962) [reversing settlement where defense counsel failed to disclose Plaintiff's aortic aneurysm found by their physician which had escaped notice of plaintiff's physicians], stating:

> "To hold that the concealment was not of such character as to result in a nonconscionable advantage over plaintiff's ignorance or mistake, would be to penalize innocence and incompetence and reward less than full performance of an officer of the Court's duty to make full disclosure to the Court . . ."]

In Hamilton v Nationwide Insurance Co, 404 SE2d 540 (W Va 1991), the West Virginia Supreme Court rescinded a state court settlement for plaintiff after it was discovered that plaintiff's counsel had accepted it as soon as he learned (but, before defense counsel knew) that in a separate declaratory action, the federal court had granted summary judgment on the issue of coverage for Nationwide's insured's actions. The Court said that even though it was not technically conditioned on the outcome of the federal action, the settlement agreement was unenforceable due to failure of consideration because "Nationwide's primary incentive for offering the $100,000 cash settlement was the unknown outcome of the declaratory judgment action." After citing West Virginia's identical counterpart to MRPC 3.3(a) and its commentary that "[m]aking a false statement includes the failure to make a statement in circumstances in which

nondisclosure is equivalent to making such a statement,"[7] the Court added:

> "While we do not dispose of this case on grounds of misrepresentation or fraud, we take a particularly dim view of Hamilton's attorney's failure to disclose his knowledge regarding the action taken by the federal court. The preferred course of action for the Hamilton's counsel, in our opinion, would have required him to voluntarily disclose the information to Nationwide in the spirit of encouraging truthfulness among counsel and avoiding the consequences of failure to disclose, *e.g.*, this appeal." 404 S.E.2d at 542, n 3.

Likewise, the Court of Appeals properly refused such harboring of error until Plaintiffs could no longer correct it. In Matley v Matley (On Rem), 242 Mich App 100, 101-102 (2000), the Court of Appeals implied that it is a fraud upon the court to conceal material facts from the court and the opposing party. Here, neither Plaintiffs nor the trial court knew what both Defendant Hospital and Defendant Douglass knew - that the Hospital intended to use the dismissal with prejudice of Dr. Douglass as a bar Plaintiffs to proceeding against the Hospital. This was a fraud on the court. The Court of Appeals correctly vacated the Order dismissing the Hospital.

---

[7]The Comment to MRPC 3.3(a) similarly states "There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation."

3. Equity Compelled The Court of Appeals To Vacate The Order Dismissing River District Hospital

MCR 2.612(C)(1)(f) permits relief from judgment or order where extraordinary circumstances exist. In Stallworth v Hazel, 167 Mich App 345, 357 (1988), the Court stated that Michigan has adopted the federal criteria for application of this provision:

> "In general, relief has been granted under this provision where the judgment was obtained by the improper conduct of the party in whose favor it was rendered, or resulted from the excusable default of the party against whom it was directed, *under circumstances not covered by clauses (1) through (5)* and where the substantial rights of other parties in the matter in controversy were not affected. (Emphasis in original, Id.).

More recently, in Heugel v Heugel, 237 Mich App 471, 481 (1999), the Court of Appeals explained that this rule provides the trial court with "'a grand reservoir of equitable power to do justice in a particular case' and 'vests power in courts adequate to enable them to vacate judgments whenever such actions is appropriate to accomplish justice.'" In Heugel, the Court held that the trial court did not abuse its discretion in finding that extraordinary circumstances existed that mandated partially setting aside the judgment of divorce. The Heugel Court confirmed that for relief to be granted under this rule, three requirements must be satisfied:

> "(1) the reason for setting aside the judgment must not fall under subsections a

> through e, (2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside, and (3) extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice." 237 Mich App at 478-479.

The Court went on to explain that this subsection provides grounds for relief even if one or more of the other bases in MCR 2.612(C) are present when additional factors are present that persuade the court that injustice will result if the judgment is allowed to stand. The Court also rejected claims that the appellant's substantial rights were detrimentally affected because he was not permitted to enforce an unconscionable agreement and the argument that the motion was untimely because it was filed 2½ months after appellant had filed his motion to enforce the judgment. In a related context, the Court of Appeals also reminded that it is well-settled that:

> "Dismissal is a drastic step that should be undertaken cautiously. Before imposing such a sanction, the trial court is required to carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper. Brenner v Kolk, 226 Mich. App. 149, 163; 573 N.W.2d 65 (1997)."

Here, Plaintiffs' counsel, Mr. Kenney, made it absolutely clear to the trial court and to the Hospital that the agreement with attorney Garrett regarding Dr. Douglass did not include dismissal of claims against the Hospital. When Judge Kelly told Mr. Kenney that he understood Plaintiffs' agreement, he added

that he was sure that **"they"** [Ms. Garrett for Dr. Douglass and Mr. Valitutti for the Hospital] **understood "too"** (Exhibit D Tr. 4/16/02, p 10). Neither Mr. Valitutti nor Ms. Garrett contradicted Judge Kelly's statement of "understanding" of all parties that the Hospital would continue as a Defendant. Because they planned to present the motion to dismiss the Hospital as soon as the dismissal of Dr. Douglass was executed, it was their affirmative duty to say that they disagreed with Mr. Kenney's interpretation. See Vickers v St. John Hospital, supra.

In Rulli v Fan Company, 683 NE2d 337 (Ohio 1997), the Ohio Supreme Court held that the trial court abused its discretion in ordering the enforcement of a disputed settlement agreement between brothers over the disposition of a business partnership. Although the parties placed the settlement on the record and affirmatively indicated that they understood its parameters and agreed to be bound by it, and the trial court filed a judgment entry as settled and dismissed, dispute soon arose over the meaning of the statements read into the record. Reversing the settlement, the Ohio Supreme Court said that, "Since a settlement upon which final judgment has been entered eliminates the right to adjudication by trial, judges should make certain the terms of the agreement are clear, and that parties agree on the meaning of those terms." 683 NE2d at 339. Given the parties' varying interpretations of the terms read into the record, the Rulli

Court said there was at best merely an agreement to make a contract because:

> "Where parties dispute the meaning or existence of a settlement agreement, a court may not force an agreement upon the parties. To do so would be to deny the parties' right to control the litigation, and to implicitly adopt (or explicitly, as the trial court did here) the interpretation of one party, rather than enter judgment based upon a mutual agreement." Id.

Here, there is not even any fair dispute as to interpretation of the agreement stated in open court and not objected to by Defendants. Defendants knew that Plaintiffs' dismissal of Dr. Douglass was to be conditioned upon the case continuing to proceed against the Hospital. Yet, they were permitted to renege on their agreement as stated in open court when the trial court accepted their legalistic argument that the document executed to dismiss Dr. Douglass did not literally preclude dismissal of the Hospital. That was error.

In this vein, Plaintiffs remind this Court of the following quote from Dean Roscoe Pound who, nearly one hundred years ago impugned what he called the "sporting theory of justice":

> "The idea that procedure must of necessity be wholly contentious . . . leads counsel to forget that they are officers of the court and to deal with the rules of law and procedure exactly as the professional football coach [deals] with the rules of the sport. The effect. . . is not only to irritate parties, witnesses and jurors in particular cases, but to give the whole community a false notion of the purpose and

> end of law. . . If the law is a mere game, neither the players who take part in it nor the public who witnesses it can be expected to yield to its spirit when their interests are served by evading it." Pound, "*The Causes of Popular Dissatisfaction With the Administration of Justice*" 29 ABA Reports 395, 404-405 (1906).

The Court of Appeals properly declined to accept that the law is "a mere game" and vacated the decision of the trial court by using its "grand reservoir of equitable power." The Court recognized that the Hospital and Dr. Douglass engaged in questionable conduct that led to an "excusable default by Plaintiffs in not securing an on-record acknowledgement of what was obvious from the surrounding circumstances.

Here, there is no detrimental effect to the substantial rights of the Hospital. To the contrary, it is Plaintiffs who have been unnecessarily put to the drastic sanction of dismissal. The Court of Appeals recognized it is grossly inequitable that Plaintiffs were prevented from having an adversary trial on the merits.

D. The Decision Of The Court Of Appeals Is Equally Proper Based On Judge Kelly's Finding Of A Clerical Mistake.

Judge Kelly concluded that resort to a mistake analysis under MCR 2.612(C)(1)(a) was unnecessary because the clerical mistake rule, MCR 2.612(A)(1) was more specifically applicable (Exhibit 1: Kelly Opinion, p 3, n 1). Judge Kelly said that the

trial judge was "obviously well aware of what had occurred" that is that "the subsequently drafted order did not accurately memorialize the parties' intent or the agreed upon stipulation placed on the record," and he "should have recognized this clerical error and granted plaintiffs' motion to correct the order to accurately reflect the parties' agreement" (Exhibit 1: Kelly Opinion, p 3). Judge Gage also agreed that the trial judge was "fully aware ... of the entire goings on throughout the case" with the order he signed specifically stating that he was "fully advised in the premises" (Exhibit 1: Gage Opinion, pp 7-8). Court of Appeals Judge Kelly reasoned that MCR 2.612(A)(1) applied because the order entered by the trial court did not accurately reflect what occurred on the record. Judge Kelly specifically rejected the dissent's assertion that the case presented nothing more than plaintiffs' counsel's "*unilateral* understanding of the intent of the order:"

Rather, these statements were overt and unambiguous statements of plaintiffs' counsel's intent and the substance of the parties agreement. The trial court deemed plaintiffs' counsel's statements "understood" and agreed to by the other parties when it stated: "I understand. I understand that. I am sure they do, too. Next." (Exhibit 1: Kelly Opinion p 2). As Judge Kelly (and Judge Gage) recognized, from the transcript, it is clear that "the parties agreed to dismiss the claim of medical

malpractice against Dr. Douglass, but *not* the claim that Dr. Douglass acted negligently to cause plaintiffs' injury nor the claim that River District Hospital was vicariously liable for Dr. Douglass' actions." (Exhibit 1: Kelly Opinion, p 2).

Here, for the reasons set forth by both Judge Gage and Judge Kelly, there is clear and convincing proof that Defendants induced Plaintiffs to agree to dismiss Dr. Douglass, all the time knowing full well that Defendant Hospital intended to bootstrap itself onto its agents' dismissal. The effect of the trial court's Order in this case was to deny Plaintiffs an adversary trial on significant issues against River District Hospital. The trial court expressed the "preference that the case proceed and be decided on the merits," but granted the summary disposition anyway (Exh F: Tr. 4/17/02, p 36). Based on the applicable law and facts, the Court of Appeals properly vacated the Order dismissing River District Hospital.

The unpublished decision of the Court of Appeals is not clearly erroneous nor will it cause substantial injustice to River District Hospital. It does not conflict with the applicable law and it presents no issues of major significance. Plaintiffs request that the Court deny leave or peremptory relief and permit the case to proceed to trial.

II. AS TO DR. DOUGLASS, THE COURT OF APPEALS PROPERLY SET ASIDE THE STIPULATION TO DISMISS AND REMANDED TO THE TRIAL COURT FOR FURTHER PROCEEDINGS.

The Court of Appeals majority discussed, and implicitly agreed, that the voluntary dismissal of Dr. Douglass amounted to a covenant not to sue, "an agreement not to sue on the existing claim" and not a release (Exhibit 1: Gage Opinion, p 5). A covenant not to sue is a collateral undertaking not to prosecute a suit which does not extinguish the cause of action. Theophelis v Lansing General Hospital, 430 Mich 473, 492 n 14 (1988). As Judge Kelly recognized, "the parties agreed to dismiss the claim of medical malpractice against Dr. Douglass, but *not* the claim that Dr. Douglass acted negligently to cause plaintiffs' injury nor the claim that defendant River District Hospital was vicariously liable for Dr. Douglass' actions." (Exhibit 1: Kelly Opinion, p 2). Accordingly, the Court of Appeals remanded to the trial court "for entry of an order vacating the stipulation and order dismissing Dr. Douglass with prejudice" (Exhibit 1: Gage Opinion, p 8). The decision of the Court of Appeals is correct and served to remedy a material injustice to Plaintiffs.

Douglass insists that the outcome of this case is controlled by the Court of Appeals decision in Rzepka v Michael, 171 Mich App 748 (1988). Rzepka is inapplicable.

Rzepka was, in relevant part, an affirmance of an appeal from a directed verdict of no cause of action on a claimed

violation of Michigan's Uniform Securities Act. Before trial, plaintiff entered into a consent judgment and proceeded to trial against employees he claimed had personally made misrepresentations to him. The trial court found no evidence of fraud or conversion and held that because the corporation had been dismissed on the securities act claim, the individuals were released on the claim.

On plaintiff's motion to set aside the consent judgment, the trial court rejected plaintiff's mistake claim saying the mistake was unilateral. Rzepka, 171 Mich App at 756. The Court of Appeals affirmed based on the express language of the securities act which, on its face, stated that if the seller (corporation) was not liable, its agents could not be liable.

As the Court of Appeals majority implicitly found, this case is obviously distinguishable. Rzepka involves none of the inequitable sharp tactics defense counsel used in this case. Here, even though the stipulation with Douglass did not expressly reserve Plaintiffs' claims against the Hospital, both Judge Gage and Judge Kelly recognized from the record made in open court that Douglass and his attorney (as well as River District Hospital and its attorney) knew what Plaintiffs' intentions were and that their attorney was not forfeiting their legal rights against the Hospital (Exhibit 1: Gage Opinion, p 7, Kelly Opinion, p 2). The Court of Appeals recognized and effectuated

the intent of the Plaintiffs to proceed against the Hospital and, as a matter of equitable principles of good faith and fair dealing simply refused to countenance the shenanigans of the attorneys for Dr. Douglass and the Hospital. The overriding principle here is Plaintiffs' intent despite the voluntary with prejudice dismissal of Douglass. Since the order entered did not accurately reflect this intent, the Court of Appeals properly set aside the stipulation to dismiss Dr. Douglass and remanded to the trial court for further proceedings.

Even if the settlement agreement was not a covenant not to sue, the Court of Appeals properly concluded that, under the circumstances presented, it should be set aside. In Vickers v St. John Hospital, 1998 Mich App LEXIS 1330 (unpubl No. 196365 4/14/98) lv den 459 Mich 1001 (1999)[Exhibit 2], the Court of Appeals held on similar facts that the trial court erred in ruling that the release and settlement of a physician extinguished the hospital's vicarious liability. The panel majority found that:

> "[T]here was sufficient uncertainty regarding the intended terms of the oral settlement, as placed on the record, to require that the trial court, when questions arose regarding the intended meaning of the agreement shortly after it was placed on the record, declare that the purported agreement failed for lack of a meeting of the minds, and leave the parties to further negotiations or trial." 1998 Mich App LEXIS 1330 *6 (footnotes omitted).

The Court of Appeals added that the decision was especially

based on the fact that the same attorney was representing both the doctor and the hospital and that the misunderstanding related to both the legal effect and the terms of the agreement. Analogously here, the attorneys were clearly working in concert. In Vickers, as here, entire on the record colloquy took place in the context that the hospital was expressly retained in the suit.

Just as the fact that plaintiff's counsel in Vickers failed to object to defense counsel's use of the term "release" did not mean that there was an agreement by plaintiff as to the term, likewise here, Mr. Kenney[8] made it clear that "what I don't want to face, Judge, obviously is that I have dismissed the claims against the hospital for the actions of Dr. Douglass. I'm not doing that. He was the actor." At this point, Trial Judge Kelly ended the discussion curtly stating, **I understand. I understand that. I am sure they do too. Next."** (emphasis added). Surely, Plaintiffs' counsel's failure to pursue the matter further does not, in this context, mean that he was agreeing to dismiss the Hospital. Here as in Vickers, under the circumstances presented, the Court of Appeals properly vacated the stipulation to dismiss Dr. Douglass.

In this case, the propriety and mode of Dr. Douglass'

---

[8]Plaintiffs' attorney here, Mr. Kenney, was also the trial attorney for Defendants St. John Hospital and Dr. Boccaccio in Vickers, and was well cognizant of the Court of Appeals decision reversing Vickers when he placed the agreement on the record in this case.

possible dismissal from the case should be determined on remand at the trial court. As Plaintiffs agreed on April 16, 2002, Dr. Douglass can be dismissed provided that all parties and the trial court can agree that the effect of his dismissal does not release Defendant River District Hospital. If such an agreement cannot be had on remand, then Dr. Douglass must remain a party Defendant. In that event, he can thank his trial counsel for requiring his continued active presence as a party at trial. Recall that his attorney at the trial court, Jane Garratt, first represented both Defendants, then represented only Dr. Douglass, and then finally reappeared as co-counsel for the Hospital after the stipulation was entered. Then, trial counsel Valitutti for the Hospital requested the sham designation of Dr. Douglass as the Hospital's designated trial representative (Hospital Exhibit D: Tr 4/16/02, p 21), even though River District Hospital already had two other employees present.

Accordingly, the leave application/request for peremptory relief in favor of Defendant Dr. Douglass should be denied.

III. BECAUSE THE TRIAL COURT AND THE COURT OF APPEALS AGREED WITH DEFENDANTS THAT LARKIN V OTSEGO MEMORIAL HOSPITAL IS FACTUALLY DISTINGUISHABLE FROM THIS CASE, THIS COURT SHOULD REJECT RIVER DISTRICT HOSPITAL'S REQUEST THAT THE COURT GRANT LEAVE TO DISAVOW THAT DECISION.

At the trial court and at the Court of Appeals, Plaintiffs argued that the order dismissing River District Hospital should

be vacated based on Larkin v Otsego Memorial Hospital, 207 Mich App 391 (1994) lv den 450 Mich 866 (1995). Both Defendants asserted with great fervor that Larkin is factually distinguishable from this case. Both the trial court and the Court of Appeals agreed with Defendants that Larkin does not control this case. Now, despite the fact that both Defendants' Applications continue to maintain that Larkin is distinguishable, River District Hospital further asserts that this Court should reach out and grant leave in this case to "disavow Larkin." This Court should decline the Hospital's invitation.

The Court of Appeals did not apply Larkin because, as Judge Gage said, "we are reluctant to broaden the scope of Larkin to include the situation in this case ... where the parties did not put their full oral agreement in writing" or "explicitly agree that Dr. Douglass was the agent of the hospital." (Exhibit 1: Gage Opinion, pp 5-6; Murray dissent, pp 3-4). Instead, Judges Gage and Kelly reversed the trial court "in the interest of averting a serious injustice" because they discerned from the record that the parties intended to dismiss the claim of medical malpractice against Dr. Douglass, but *not* the claim that Dr. Douglass acted negligently to cause plaintiffs' injury not the claim that defendant River District Hospital was vicariously liable for Dr. Douglass' actions" (Exhibit 1: Kelly Opinion, p 2). Therefore, Plaintiffs were entitled to relief from judgment

based on the conduct of the parties before the trial court and Larkin was ultimately held collateral to the Court of Appeals' adjudication.

Based on the rulings appealed from, there is absolutely no context presented for this Court to use this case to consider the continued viability of the Larkin decision. The Court of Appeals discussion of Larkin is mere dictum, that is:

> "[A]n observation or remark made by a judge in pronouncing an opinion upon a cause, concerning some rule, principle or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination. Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand are obiter dicta, and lack the force of an adjudication." Black's Law Dictionary (6th ed p 454).

Larkin is not part of what Justice Benjamin Cardozo called "the essential and inherent" in this case. Cardozo, The Nature of the Judicial Process, (New Haven Yale University Press 1921) p 131.

Moreover, the Court of Appeals in Larkin deliberately examined and decided principles of law. Under the doctrine of stare decisis, such principles "'decided by a court of competent jurisdiction should not be lightly departed.'" Boyd v W G Wade Shows, 443 Mich 515, 325, n 15 (1993), quoting People v Jamieson, 436 Mich 61, 79 (1990). As this Court stated in Parker v Port Huron Hosp, 361 Mich 1, 10 (1960), "Only in rare cases when it is clearly apparent that an error has been made, or changing

conditions result in injustice by application of an outmoded rule, should we deviate from following the established rule."

In short, Defendant Hospital's invitation to this Court to overrule Larkin satisfies none of the MCR 7.302(B) grounds for leave or for peremptory relief. This Court should resist the Hospital's exhortation to assume the mantle of its particular group of medical malpractice defendants and their personal perspective and act as "knights-errant, roaming at will in pursuit of our own ideal of truth and goodness ... ." Cardozo, The Nature of the Judicial Process, (New Haven Yale University Press 1921) p 141. The leave applications should be denied.

RELIEF REQUESTED

For the reasons set forth, Plaintiffs submit that Defendants' Applications for peremptory relief or leave to appeal should be denied so that the case can proceed to trial as directed by the Court of Appeals.

Respectfully submitted,

FIEGER, FIEGER, KENNEY & JOHNSON, PC

Dated: November 15, 2004

By: Victor S. Valenti

VICTOR S. VALENTI (P36347)
Attorney for Plaintiffs-Appellants
19390 West Ten Mile Road
Southfield, MI 48075
(248) 355-5555